IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 222 of 2003
IN
COMPANY PETITION No 263 of 2000
WITH
COMPANY APPLICATION No 223 of 2003
IN
COMPANY PETITION No 043 of 2000
WITH
COMPANY APPLICATION No 139 of 2000
AND
COMPANY APPLICATION No 224 of 2003
IN
COMPANY PETITION No 259 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAFATLAL INDUSTRIES LTD.

Versus

S.A. CHEMICALS

Appearance:

1. COMPANY APPLICATION No. 222 of 2003
MR SB VAKIL, SENIOR ADVOCATE WITH
MR AS VAKIL for Applicant.
MR GT DAYANI for Respondent No. 1

2. COMPANY APPLICATION Nos. 223 of 2003
MR SB VAKIL, SENIOR ADVOCATE WITH
MR AS VAKIL for Applicant.
MR AR MAJMUDAR for Respondent No. 1

3. COMPANY APPLICATION No. 224 of 2003
MR SB VAKIL, SENIOR ADVOCATE WITH
MR AS VAKIL for Applicant.
MR SN SOPARKAR, SENIOR ADVOCATE WITH
MRS SWATI SOPARKAR for Respondent No.1.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 20/04/2005

COMMON ORAL JUDGEMENT

Company Application No. 139 of 2000 is filed by Mafatlal Industries Ltd. praying for the dismissal and/or suspension of Company Petition No. 259 of 1999 in view of the provisions contained in Section 22 (1) of the Sick Industrial Companies (Special provisions) Act,1985 (SICA) and for termination and/or suspension of the order passed by this Court in Company Application No. 355 of 1999, as extended from time to time.

2. All the remaining three applications are filed by the same applicant, namely, Mafatlal Industries Limited for seeking an order from this Court that the respective Company Petitions, namely, Company Petition Nos. 263 of 2000, 43 of 2000 and 259 of 1999 filed by the different petitioning Creditors against the applicant Company have stood withdrawn and all the interim orders passed therein have stood vacated on and from 30.10.2002 being the date of sanction of the Scheme for rehabilitation of the applicant Company in Case No. 104 of 2000 by Board for Industrial and Financial Reconstruction (For short 'BIFR').

3. Company Petition No. 263 of 2000 is filed by the petitioning Creditor, namely, M/s. S.A. Chemicals under Section 433 and 434 of the Companies Act, 1956 for winding up of the Company on the ground that the Company has failed and neglected to pay its dues of Rs.18,08,495/- to the petitioning Creditor.

4. Company Petition No. 43 of 2000 is filed by the petitioning Creditor, namely, Narendra I. Patel under Section 433 and 434 of the Companies Act, 1956 for winding up of the Company on the ground that the Company

has failed and neglected to pay its dues of Rs.98,720/- to the petitioning Creditor.

5. Likewise, Company Petition No. 259 of 1999 is filed by the petitioning Creditor, namely, LKP Merchant Financing Limited under Section 433 and 434 of the Companies Act, 1956 for winding up of the Company on the ground that the Company has failed and neglected to pay the lease rental of Rs.31,64,427/- per quarter for the use of the plant and machinery and as on 31.03.1999, the Company owed to the petitioning Creditor a principal amount of Rs.1,21,25,306/-.

6. Since common issue is involved in all the three applications, they are being disposed of by this common judgment.

7. Since detailed arguments were canvassed in Company Application No. 224 of 2003, the facts are taken from Company Application No. 224 of 2003.

8. Heard Mr. S.B. Vakil, learned Senior counsel appearing with Mr. A.S. Vakil, learned advocate for the applicant in all the three applications and Mr. S.N. Soparkar, learned Senior counsel appearing with Mrs. Swati Soparkar, learned advocate for the respondent in Company Application No. 224 of 2003, Mr. A.R. Majmudar, learned advocate appearing for the respondent in Company Application No. 223 of 2003 and Mr. G.T. Dayani, learned advocate appearing for the respondent in Company Application No. 222 of 2003.

9. The applicant Company has executed Regd. Mortgage Deed in favour of Global Trust Bank Limited (for short 'GTBL') on 30.03.1998 in respect of the loan transactions, mortgaging a immoveable property, namely, Mafatlal Centre, Nariman Point, Mumbai. The petitioning Creditor, namely, LKP Merchant Financing Ltd. has filed winding up petition on 20.08.1999 being Company Petition No. 259 of 1999 wherein this Court has issued notice on 28.09.1999. Thereafter, the petitioning Creditor has also filed Company Application No. 355 of 1999 praying for an injunction restraining the Company from selling, mortgaging, assigning or otherwise transferring any of its property except in normal course of business of purchase and sale of goods. This Court has passed an order on 23.09.1999 directing the office to list both the Company Petition and Company Application on 07.10.1999 and further directed that if the respondent Company proceeded to dispose of the movable properties as disclosed in Annexure A to the application or in any

manner or way on/or before the said date, then in that case the respondent Company shall set apart a sum of Rs.1,38,47,333 which was said to be due to the petitioning Creditor by the respondent Company on the date of filing of the petition, and shall deposit the same in a fixed deposit account to be opened by the respondent Company.

10. The Court has passed further order on 07.10.1999 observing that the directions given by this Court in the order dated 23.09.1999 shall continue to operate. Thus, in the event of sale and disposal of the property referred to in the said order, portion of the sale proceeds, as directed in the said order, shall be deposited in a Fixed Deposit Account.

11. The applicant Company made a reference to BIFR on 23.02.2000 under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short "SICA"). Before the said reference was registered by BIFR on 21.03.2000, pursuant to the power of sale out of Court contained in the Mortgage Deed dated 30.03.1998, GTBL had entered into a contract of sale of the mortgaged property in favour of Shruti Properties (Private) Limited (for short 'Shruti'). The reference filed by the Company before BIFR was registered on 24.03.2000 as Case No. 104 of 2000. The GTBL, therefore, made an application to BIFR on 10.05.2000 stating that the Company had availed of a short term loan of Rs. 30 Crores from GTBL and created in favour of GTBL an English mortgage under the mortgage deed dated 30.03.1998, and GTBL had exercised its right as a mortgagee under the said deed to sell the mortgaged premises and sought directions to the Company to permit the appropriate authority under the I.T. Act, the representatives of the Bank and the intending buyer to inspect the premises. The applicant Company thereafter filed a suit in the Bombay High Court for injunction restraining GTBL from selling the mortgaged property or from taking any steps for the same without the consent of the BIFR. The Bombay High Court heard the matter on 29.06.2000 and declined to grant injunction sought by the Company. The Company filed two applications (i) dated 11.07.2000 for directions u/s. 22(1)/22(3) of SICA and (ii) dated 24.08.2000 for ad interim stay of sale proceedings. BIFR by its order dated 31.08.2000 inter alia indicated that it was in the process of considering the Company's reference with a view to determining whether the Company was a sick industrial company or not and did not consider it appropriate to pass orders on the prayers of the Company or GTBL, when the reference under Section 15(1) of SICA

was to come for consideration on 19.09.2000. However, without waiting for further orders of BIFR, GTBL executed a Regd. Sale Deed dated 18.09.2000 selling the mortgaged properties to Shruti. The Company brought the said fact to the notice of BIFR. On 19.09.2000, BIFR declared the Company as a Sick Industrial Company in terms of Section 3(1)(o) of SICA and appointed IDBI as the operating agency under Section 17(3) of SICA to examine the viability of the Company and submit its report, if viable.

12. On 08.01.2001, the applicant Company and GTBL agreed to refer all the disputes relating to the loan transaction to the sole Arbitrator of Shri Rangnath Mishra, a Retired Judge of the Hon'ble Supreme Court of India. The Arbitrator in his award dated 23.02.2001 held that it was not necessary to determine whether the transaction dated 30.03.1998 amounted to an English mortgage, that the mortgagee had the right to sell without resorting to judicial proceedings, that there had been compliance of the provision for the transfer as detailed by the Apex Court leading to registration of the sale deed and that by that process the right to redeem the mortgage had been extinguished, that BIFR had not imposed any restrictions by any specific order on the registration of the sale deed, that the agreement dated 21.03.2000 in favour of Shruti was entered at a time when no reference under SICA had been registered, that the sale deed was in fulfillment of the obligation created in favour of a bonafide purchaser, that GTBL had got its dues and was not entitled to receive anything more, that the personal guarantee stood discharged.

13. The rehabilitation proposal submitted by the Company before BIFR was discussed at the joint meeting held on 24.09.2001. There was broad consensus amongst the participants with the exception of a few parties to the proposal submitted by the Company. Subsequently, the State Bank of India, leading Bank conveyed in writing its acceptance to the proposal. At the hearing held on 14.12.2001, the Bench directed the Operating Agency to submit revised rehabilitation proposal after incorporating the response of the concerns shown by the Bench, the workers and the consortium of Banks. IDBI submitted its report on 28.01.2002 indicating that the operations of the Company based on the reliefs and the concessions from Banks and institutions, Central and State Government Agencies and others would be viable. The Bench vide its order dated 20.02.2002 circulated a draft rehabilitation Scheme based on the status report submitted by IDBI to all concerned for their consent as

required under Section 19 (2) read with Section 19 (1) of the Act. The draft rehabilitation Scheme was required to be amended in light of objections / suggestions received from various parties. The modified draft rehabilitation scheme was also required to be discussed in the joint meeting. The Bench, therefore, directed the Operating Agency to modify the draft rehabilitation scheme in light of the discussions at the hearing and discussed the modified draft rehabilitation Scheme in a joint meeting to all concerned whose consent was required under Section 19 (2) of the Act within 30 days and submit its report along with the minutes of the joint meeting duly signed by all concerned in full with their designation.

14. The BIFR has also passed an order directing that the draft rehabilitation scheme should be circulated for consent and also directed to the Operating Agency under Section 18(3)(a) of SICA to publish short particulars of the DRS in two local dailies, where Regd. office of the Company is situated. The advertisements were accordingly published and after considering the objections and suggestions to the draft rehabilitation Scheme, the BIFR has sanctioned the scheme on 30.10.2002, as there was consensus to the reliefs and concessions envisaged in the Scheme among the major Section 19(2) parties and the State Government, Ahmedabad Municipal Corporation / Nagarpalikas of Navsari and Nadiad, Tata Electricity Company, other Central Govt. Organisations have been requested to consider granting reliefs and concessions sought from them.

15. The Scheme interalia envisages certain reliefs and concessions with effect from 31.03.2001 being the cut off date. In para 5.1 - J (ix), the promoters had agreed to comply with the directions given by the High Court in respect of LKP Merchant Financing Ltd. Appendix IX of the Scheme contains terms and conditions for settlement of secured term lenders, a Scheme of demerger between the applicant and the Polyolefins Rubber Chemicals Limited (for short 'PRCL') and Sulakshana Securities Ltd. (for short 'SSL') as well as general terms and conditions. Para 16 (e) of the Scheme states that on and from the date of sanction of the Scheme, all pending legal cases against the Company for recovery of dues and winding up petitions filed by various parties would stand withdrawn.

16. Based on the aforesaid provisions contained in the Scheme, the applicant filed the present applications before this Court seeking an order from this Court that Company Petitions, namely, Company Petition Nos. 263 of 2000, 43 of 2000 and 259 of 1999 filed by the different

petitioning Creditors against the applicant Company have stood withdrawn and all the interim orders passed therein have stood vacated on and from 30.10.2002 being the date of sanction of the Scheme for rehabilitation of the applicant Company in Case No. 104 of 2000 by Board for Industrial and Financial Reconstruction.

17. Before the above application is filed before this Court by the Company, the petitioning Creditor, namely, LKP Merchant Financing Ltd. has filed an application under Section 18 (5) of SICA for review / directions / clarification of the sanctioned Scheme dated 30.10.2002, before BIFR. The LKP has raised the objections to the sanctioned scheme to the effect that LKP is not agreeable to the reduction of its dues which are Rs.2,49,00532/- as on 31.12.2002 to Rs. 23 Lacs as indicated in Appendix XI at page No. 59 of the sanctioned Scheme and that LKP is not agreeable to waiver of the entire interest and other charges as indicated in para 5 (c) (ii) on page 16 of the Scheme, and that LKP is further not agreeable to the repayment Schedule of 20 quarterly installments commencing from 30.06.2003 without interest as indicated in para 5 (3) (ii) on page No. 16 of the sanctioned Scheme, and that as the lease agreement had come to an end by afflux of time and the leased assets are being still wrongfully enjoyed by the Company, the Company should therefore pay mesne profits to LKP, for this period, after the expiry of the lease agreement and that LKP insists on the return of the leased assets to it forthwith as the same are still the property of LKP as the ownership has not been transferred to the Company as it has neither paid the other due lease rentals nor the residual value as was required to be done on the expiry of lease agreement and that in case these assets are used by the Company then it should pay the lease rentals in advance to LKP, without prejudice to LKP's rights to recover the past dues in this regard.

18. The LKP being the respondent of this application has filed additional affidavit on 24.09.2004 and along with this additional affidavit, a copy of the above application preferred by the LKP before the BIFR is annexed and submitted that in view of the said application, the prayers sought for in the application preferred by the Company before this Court should not be granted.

19. The applicant Company filed its affidavit-in-reply to the additional affidavit filed by the respondent LKP on 11.11.2004. It is stated therein that on the application preferred by LKP before BIFR, an

order was passed on 03.02.2004 which is annexed at Annexure A to the said affidavit-in-reply wherein it is stated that LKP falls under 'other Creditors' vide Appendix XI of the sanctioned scheme read with Sub-para (2) in page 20 and 21 of the sanctioned Scheme, Clause 9. The Gujarat High Court had ordered the Company in 1999 to set certain assets apart for LKPMFL so that they could be paid Rs. 1.38 Crores. However, the sanctioned scheme provide only for Rs. 23 Lacs. Accordingly, they had filed review application before the Board on 07.01.2003. The Bench observed that as per law, the Board could not review its own orders. Mr. Shroff, representing LKPMFL before the BIFR submitted that they could have gone on appeal against the sanctioned scheme only if the Board had specifically rejected their claim. Considering the facts on record and the submissions made at the time of hearing, the Board directed that LKPMFL to make its submission in writing to the Board within 15 days with copies to the monitoring agency and the company both of whom shall submit their comments and recommendations thereon to the Board within 15 days of receipt thereof. Pursuant to the aforesaid order of BIFR, LKPMFL had filed their written submissions. However, comments and recommendations are not yet filed by the Monitoring Agency as well as by the Company.

20. The respondent Company in the present proceedings has further filed reply to the Company's affidavit filed on 11.11.2004 wherein it is stated that BIFR has in the sanctioned scheme incorporated the order of this Court dated 23.09.1999 in as many words, the Company is therefore bound to honour the said order, otherwise it shall be liable for contempt. It is further stated that there being no contradiction in the order of this Court as well as the order of BIFR and in view of the fact that the Company has also made a statement before BIFR to the same effect, if the commitment is not honoured, the Company will be liable for contempt as well as forgery. It is also stated in the affidavit that the review application of LKPMFL before BIFR is still not disposed off as both the Company as well as Operating Agency have not filed their written submissions. It is, however, stated that the pendency of the said application of LKPMFL would not be a bar to the relief being sought by LKP as necessary direction in its favour are already contained in the sanctioned scheme. It is, therefore, submitted that this Court should direct the Company to immediately comply with the order dated 23.09.1999 and there is no question of dismissal of the winding up petition pursuant to the sanctioned scheme.

21. In the above background of the matter, Mr. S.B. Vakil, learned Senior counsel appearing for the applicant in all the three applications has strongly submitted that looking to the Provisions made in the sanctioned scheme, more particularly, the provisions contained in para 16 (e) of the sanctioned scheme as well as the relevant statutory provisions of SICA, all the three winding up petitions which are filed against the Company stood withdrawn on the date when the Scheme was sanctioned by BIFR. In this connection, he has invited the attention of this Court to the relevant statutory Provisions of the Act. Section 17 (3) of the Act provides for appointment of the Operating Agency and preparation of Scheme. Section 18 provides for preparation and sanction of Scheme. Section 18(2)(e) provides that the Scheme may provide for continuation by or against the Sick Industrial Company or as the case may be, the Transferee Company of any action or other legal proceedings pending against the Sick Industrial Company immediately before the date of the order made under Sub-section (3) of Section 17. Section 18(3)(a) provides that the Scheme prepared by the Operating Agency shall be examined by the Board and a copy of the Scheme with modification, if any, made by the Board shall be sent, in draft, to the Sick Industrial Company and the Operating Agency and in the case of amalgamation also to any other Company concerned, and the Board shall publish or to be published the draft scheme in number of such daily newspapers as the Board may consider necessary, for suggestion and objections, if any within such period as the Board may specify. Section 18 (8) of the Act provides that on and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the Scheme or such provision shall be binding on the Sick Industrial Company and the Transferee Company or as the case may be, the other Company and also on the shareholders, Creditors and Guarantors and employees of the said Companies.

22. Based on the aforesaid provisions, Mr. Vakil has submitted that Section 18(8) specifically provides that no sooner the sanctioned scheme or any provision thereof comes into operation, the same shall be binding not only on the Sick Company but also on the shareholders, Creditors and Guarantors and employees of the said Companies. The petitioners who have filed the winding up petitions before this Court are the Creditors of the Company and hence, the sanctioned scheme as well as the provisions made therein are equally binding on them. Para 16(e) of the sanctioned scheme specifically states that on and from the date of sanction of the scheme, all pending legal cases against the company for recovery of

dues and winding up petitions filed by various parties would stand withdrawn. Now, the Scheme was sanctioned by BIFR On 30.10.2002 and hence, on and from that date, all pending legal cases against the company for recovery of dues and winding up petitions filed by various parties would stand withdrawn in view of the provisions contained in para 16(e) of the sanctioned scheme read with Provisions of Section 18 (8) of the Act.

23. Mr. Vakil has further submitted that Section 18(9) provides that if any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may, on the recommendation of the Operating Agency or otherwise, by an order do anything, not inconsistent with such provisions, which appears to it be necessary or expedient for the purpose of removing the difficulty. Section 18 (10) also provides that the Board may, if it deems necessary or expedient so to do, by an order in writing, direct any operating agency specified in the order to implement a sanctioned scheme with such terms and conditions and in relation to such Sick Industrial Company as may be specified in the order. Section 18(12) provides that the Board may monitor periodically the implementation of the sanctioned Scheme. In view of these provisions, Mr. Vakil has submitted that once the Scheme is sanctioned, the original debts claimed by the petitioning creditors against the Company do not survive and the sanctioned scheme being binding on the petitioning Creditors, the amount which is directed to be paid and during which period the said amount is to be paid is governed by the provisions contained in the Scheme and hence, the petitioning Creditors cannot pursue the winding up petitions against the Company. If at all the Company has failed to implement the Scheme, the remedy available to them is to approach the BIFR and the BIFR can pass appropriate order in the matter. He has, therefore, submitted that simply because an allegation is made by the petitioning Creditors against the Company that the Scheme has not been implemented and no payment has been made would not give any rise to continuation of the winding up proceedings against the Company and hence, all these winding up petitions stood withdrawn. He has, therefore, submitted that the applications should be allowed by dismissing the winding up petitions as withdrawn.

24. Mr. S.N. Soparkar, learned Senior counsel appearing for the present respondent LKPMFL has submitted that the applicant Company had entered into a Memorandum of Agreement dated 27.01.2000 with LKP, wherein the dues of LKP were admitted and crystalised by the applicant

Company to the tune of Rs.1,93,42,940/- as on that date, to be repaid in the manner provided in the Memorandum of Agreement. The applicant Company was to deliver 13 post-dated cheques in due discharge of the payment. The applicant has irrevocably agreed to honour the above commitments even in a situation where BIFR suspends operation of all the Lease Agreements and declares the Company as a Sick Industrial Company. The applicant Company was, therefore, under an obligation to honour the said agreement/settlement arrived at between LKP and MIL dated 27.01.2000 as regards MIL's dues towards LKP.

25. Mr. Soparkar has further submitted that in the hearing before BIFR on 25.02.2002, it was pointed out to the Bench on behalf of LKP that this Court in LKP's winding up petition being Company Petition No. 259 of 1999 on 23.09.1999 had directed the Company to set apart a sum of Rs.1,38,47,333/- which was due to LKP as on 29.04.1999 and in the said hearing, on being asked by the Bench, the counsel appearing for the Company Shri Alok Dhir submitted that they were following and honouring that undertaking. Despite this observation made by the Bench and the assurance given by the counsel for the Company, the Company has failed to honour its offer and in the sanctioned Scheme, the same amount of Rs. 23 Lacs has been provided for. He has, therefore, submitted that so long as the sanctioned scheme is not implemented by the Company in its true letter and spirit and the Company is guilty of committing breach of the provisions contained in the said Scheme, it is not open for the Company to move the present application seeking dismissal of the winding up petitions on the ground that on the basis of the provisions contained in para 16 (e) of the Scheme read with provisions contained in Section 18 (8) of the Act, the winding up petitions stand withdrawn. He has, therefore, submitted that the present applications deserve to be rejected and the applicant may be directed to set apart a sum of Rs.1,38,47,333/- as per the order of this Court passed on 23.09.1995 in Company Petition No. 259 of 1999.

26. So far as other two applications are concerned, Mr. Vakil has adopted the same argument for dismissal of Company Petition Nos. 263 of 2000 as well as 43 of 2000. Mr. Vakil has further submitted that neither of these two petitioning Creditors have filed any reply to the present application nor they have approached to BIFR seeking any clarification in the matter. He has, therefore, submitted that the cases of these two Petitioning Creditors stand on altogether different footings and there is no scope for canvassing any

argument for continuation of the present winding up proceedings against the Company.

27. Mr. G.T. Dayani and Mr. A.R. Majmudar, learned advocates appearing for the Petitioning Creditors, on the other hand, have strongly objected to the present applications and submitted that as per the sanctioned Scheme, para 5 deals with reliefs and concessions and clause C of para 5 talks about other Creditors. Sub-clause (i) of Clause C deals with Pressing Creditors as given in Appendix X to be repaid during 2002-03 and 2003-04 without interest. Even Sub-clause (iii) of Clause 3 deals with some of the other liabilities being transferred to PRCL (including public fixed deposits) to be repaid in normal course. Mr. Dayani and Mr. Majmudar have, therefore, submitted that the provisions contained in Para 5 C (i) and (iii) have not been complied with by the Company and since the Scheme has not been implemented in its entirety, it is not open for the applicant Company to resort to any particular provision which suits to its purpose and ignoring the other provisions of the Scheme. They have further submitted that the petitioning Creditors were not parties before BIFR and they have not been heard in the matter and hence, the provisions of the Scheme are violative of principles of natural justice. Even on this ground, the Scheme cannot be enforced against them. In any case, till the period prescribed in the Scheme for implementation and till the dues which are mentioned in the Scheme are paid to the petitioning Creditors, there is no question of dismissal of winding up petitions. At the most, the petitions should be kept pending during this period.

28. After having heard learned advocates appearing for the respective parties and after having gone through the provisions contained in the Scheme as well as the relevant statutory provisions dealing with the issue which is raised in the present applications, the Court is of the view that it is not just, proper and equitable on the part of the applicant Company to seek the dismissal of the winding up petitions on the ground that the Scheme has already been sanctioned and it is binding on the petitioning Creditors. It is true that para 16 (e) of the Sanctioned Scheme in terms states that on and from the date of sanction of the scheme, all pending legal cases against the company for recovery of dues and winding up petitions filed by various parties would stand withdrawn. The Scheme was sanctioned on 30.10.2002. However that sanctioned scheme casts certain duties and obligations on the Company and if the Company fails to

discharge those obligations, it is not open for the Company to seek the dismissal of the winding up petitions. This very sanctioned scheme states that the proposal made by the Company envisages certain reliefs and concessions with 31.03.2001 as the cut-off date. The petitioning Creditor in Company Petition No. 222 of 2003 falls in the category of Pressing Creditors and they are to be repaid during 2002 - 03 and 03 - 04 without interest. This petitioning Creditor has not been paid so far any amount despite there being specific provision in the Scheme. The petitioning Creditor in Company Petition No. 223 of 2004 falls in the category of other liabilities being transferred to PRCL including public fixed deposit to be repaid in normal course. They are also not paid. The petitioning Creditor in Company Petition No. 224 of 2003 falls in the category of Leasing Companies and Scheme says that they agree to waive entire interest and other charges and adjust payments already received against the original disbursement outstanding amount of Rs.1569 Lacs (details given in Appendix XI to be repaid in 20 quarterly installments commencing from 30.06.2003 without interest). The petitioning Creditor has specifically objected to this provision and moved an application before BIFR for review of the order.

29. It is also an admitted position that Scheme refers in Clause J that Promoters agree to comply with the directions given by the High Court in respect of LKP Merchant Financing Limited. This Court has given direction on 23.09.1999 to set apart a sum of Rs.1,38,47,333/-. The argument of Mr. Vakil does not seem to be convincing as the Promoters and the Company are not two different entities so far as the scheme proposed by them is concerned. It is not correct to state that the Promoters have agreed to comply with the directions of this Court and the Company had not agreed to comply with the said directions. As a matter of fact, the learned advocate appearing for the Company before BIFR has undertaken to comply with the directions of this Court. Hence, this being part of the Sanctioned Scheme, it is obligatory on the part of the Company to set apart a sum of Rs.1,38,47,333/-. By seeking dismissal of winding up petitions, the intention of the Company is to get rid of the said directions which is not permissible and the Company is bound to comply with the said directions. There is no substance in the argument of Mr. Vakil that the applicant Company has not sold any assets and hence directions given by this Court would not apply. The Company was a party in all these proceedings and hence it cannot escape from its liabilities.

30. Even otherwise, Section 18 (8) in terms states that on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the Scheme or such provision shall be binding on the Sick Industrial Company. The Provisions contained under the head reliefs and concessions are equally binding on the Company and if the Company itself commits breach of these provisions, it is not open for the Company to invoke the other provisions against the Creditors and to seek the dismissal of the winding up petitions. It is settled proposition in law that a person who comes before the Court for a particular relief asking others to perform their part of obligation should first show his willingness to perform his part of obligation. In the present case, the sanctioned scheme casts an obligation on the Company to perform its obligations and to act as per the provisions contained in the Scheme. Unless and until this is done, the Court can not and should not accept the request of the Company for dismissal of the winding up petitions.

31. Taking any view of the matter and considering the entire Scheme as well as the statutory provisions, the Court is of the view that there is no substance in any of the three applications moved by the applicant Company seeking dismissal of the winding up petitions and hence, all the three applications are hereby rejected and before seeking dismissal of any of these petitions, the Company shall see to it that the sanctioned Scheme be implemented in its true letter and spirit including the directions given by this Court on 23.09.1999.

32. In view of the aforesaid order, Company Application No. 139 of 2000 does not survive and hence, it is accordingly disposed off.

33. A copy of this order should be kept in the file of each of these three applications and it should also be forwarded to BIFR so as to see that the Scheme be properly implemented by the Company.

[K.A. PUJ, J.]

#Savariya#

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